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# Supreme Court of the United States

October Term, 1970

No. 419

JOHN J. McDOUGALD,

Petitioner,

v.

STATE OF NORTH CAROLINA

Respondent.

## BRIEF OF RESPONDENT, STATE OF NORTH CAROLINA, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

### OPINION BELOW

Petitioner originally filed a petition for post conviction relief in the Superior Court, Division, General Court of Justice, Cumberland County, North Carolina, which was denied in an order entered March 17, 1970, by the Honorable Hamilton H. Hobgood, Judge Presiding. Petitioner then filed a Petition and Application for writ of certiorari in the Court of Appeals of North Carolina, which, upon answer by the State of North Carolina, was denied by order of the Court in Conference on April 23, 1970 (No. 708C122PC). Copies of both orders are appended to petitioner's petition.

From the judgment below, petitioner has filed this Petition for a Writ of Certiorari to the Court of Appeals of North Carolina in the Supreme Court of the United States.

### JURISDICTION

The jurisdiction of this Court has been invoked pursuant to 28 U.S.C. §1257(3).

## QUESTION

DOES THE IMPOSITION OF A GREATER SENTENCE UPON JURY TRIAL AND CONVICTION WHEN THE ACCUSED EXERCISED HIS UNFETTERED AND ABSOLUTE RIGHT TO TRIAL DE NOVO, VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT?

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES:

### AMENDMENT XIV.

§1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

GENERAL STATUTES OF NORTH CAROLINA:

§7A-290 *Appeals from district court in criminal cases; notice; appeal bond.*—Any defendant convicted in district court before the magistrate may appeal to the district court for trial de novo before the district court judge. Any defendant convicted in district court before the judge may appeal to the superior court for trial de novo. Notice of appeal may be given orally in open court, or to the clerk in writing within 10 days of entry of judgment. Upon receiving notice of appeal, the clerk shall transfer the case to the district or superior court criminal docket. Appeal bond may be set by the judge in his discretion.

§15-177.1: *Appeal from justice of the peace or inferior*

*court; trial anew or de novo.*—In all cases of appeal to the superior court in a criminal action from a justice of the peace or other inferior court, the defendant shall be entitled to a trial anew and de novo by a jury, without prejudice from the former proceedings of the court below, irrespective of the plea entered or the judgment pronounced thereon.

## STATEMENT OF THE CASE

On February 20, 1969, petitioner was tried on four charges of breaking and entering coin machines and three charges of contributing to the delinquency of a minor in the District Court Division of the General Court of Justice of Cumberland County, North Carolina. The Honorable Joseph E. Dupree, Judge Presiding, found petitioner guilty on each charge and sentenced him under a consolidated judgment to a term of eighteen months imprisonment.

Petitioner appealed from said judgment to the Superior Court of the General Court of Justice of Cumberland County, North Carolina, for a trial *DE NOVO* before a jury. On April 3, 1969, following verdicts of guilty to the same charges, the Honorable W. H. S. Burgwyn, Jr., Judge Presiding, sentenced petitioner to three sentences of two years imprisonment each, running consecutively, and four two-year suspended sentences to run concurrently at the expiration of the active sentences.

On January 27, 1970, petitioner filed a petition for post conviction relief, pursuant to North Carolina General Statutes, §15-217, et seq., in the Superior Court Division of the General Court of Justice of Cumberland County, North Carolina. Petitioner raised therein the question sought to be reviewed in this Court, praying that his present sentences be set aside or modified by reduction to conform to the sentence imposed in the District Court Division on February 20, 1969. By order of March 17, 1970, the Honorable Hamilton H. Hobgood, Judge Presiding, denied the petition; finding that the sentence im-

posed in the Superior Court Division did not exceed the statutory maximum, and that petitioner's rights under the Constitution of the State of North Carolina and the Constitution of the United States were not violated.

Petitioner then petitioned the Court of Appeals of North Carolina for a writ of certiorari to review the decision of the Superior Court Division of the Cumberland County General Court of Justice in the post conviction proceedings. The North Carolina Court of Appeals denied the petition for a writ of certiorari by order of the Court in Conference on April 23, 1970.

## ARGUMENT

THE IMPOSITION OF A GREATER SENTENCE UPON JURY TRIAL AND CONVICTION WHEN THE ACCUSED EXERCISED HIS UNFETTERED AND ABSOLUTE RIGHT TO TRIAL DE NOVO, DOES NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

The petitioner argues that NORTH CAROLINA v PEARCE, 395 US 711; 23 L Ed 2d 656, 89 S Ct 2072 (1969), compels a holding that the increased sentence received by petitioner on trial DE NOVO in the Superior Court, after conviction in the lower, inferior court, violated the petitioner's rights under the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States. Courts which have considered the issue involved in the present case, which include the state courts of North Carolina, Michigan, Virginia and Maine and the United States Court of Appeals for the First Circuit, do not concur in this view. STATE v SPARROW, 7 NC App 107, 171 SE 2d 321 (1970); STATE v SPENCER, 7 NC App 282, 172 SE 2d 280 (1970); STATE v MIDGETT, 8 NC App 230, 174 SE 2d 124 (1970); STATE v SPARROW, 276 NC 499, 173 SE 2d 897 (1970); STATE v SPENCER, 276 NC 535, 173 SE 2d 765 (1970); PEOPLE v OLARY, 382 Mich 559, 170 NW 2d 842 (1969); EVANS

v CITY OF RICHMOND, 210 Va 493, 171 SE 2d 247 (1969); LEMIEUX v MAINE, 240 A 2d 206 (Me. 1968); and LEMIEUX v ROBBINS, 414 F 2d 853 (1st Cir., 1969). From the decision of the United States Court of Appeals for the First Circuit in LEMIEUX v ROBBINS, *supra*, a petition for a writ of certiorari was denied by this Court on March 30, 1970, 397 US 1017, 25 L Ed 2d 432. The decision in TORRANCE v HENRY, 304 F Supp 725 (1969), handed down by the Federal District Court for the Eastern District of North Carolina, is contrary to the position taken by the State of North Carolina.

In PEARCE, the appellant was tried and sentenced in the State superior court. His conviction was reversed on appeal after his successful attack on constitutional grounds and he was retried in the same superior court. Thus, he was clearly RETRIED in a second court of record and of equal dignity with the court which held his first trial.

The language of this Court in PEARCE implies that the principle enunciated should be limited to the facts of that case. The problem before the Supreme Court concerned

> "the constitutional limitations upon the imposition of a more severe punishment after conviction for the same offense upon *retrial*." 23 L Ed 2d 656, 664.

or, as otherwise stated,

> "what constitutional limitations there may be upon the general power of a judge to impose *upon reconviction* longer prison sentence than the defendant originally received." 23 L Ed 2d 656, 666.

The Court also refers to

> "a man who is *retried after his first conviction has been set aside* . . ." 23 L Ed 2d 656, 668.

and condemns the practice of a trial court following

> "an announced practice of imposing a heavier sentence upon every reconvicted defendant, for the explicit purpose of punishing the defendant for his having succeeded in getting his original conviction set aside . . . [w]here . . . the original conviction has been *set aside because of a constitutional error* . . ." 23 L Ed 2d 656, 668.

The State submits that the instant case is readily distinguishable. The petitioner here was tried DE NOVO in the superior court under N.C.G.S. §7A-290 according to the standards enumerated in N.C.G.S. §15-177.1. The petitioner was not required to attack his conviction or sentence in the district court or seek a reversal since trial DE NOVO in the superior court is an absolute right even where the defendant pleads guilty in the lower court. STATE v MEADOWS, 234 NC 657, 68 SE 2d 406 (1951); STATE v BROOM, 269 NC 661, 153 SE 2d 384 (1967).

When an appeal of right is taken to the Superior Court the case is, in the eyes of the State, ". . . originally brought therein, . . . upon questions of law and fact, the judgment appealed from is completely annulled and *is not thereafter available for any purpose*." STATE v ANDERSON, 5 NC App 614, 615, 196 SE 2d 38 (1969). See also STATE v GOFF, 205 NC 545, 172 SE 407 (1934). Great force is added to this statement by the fact that the district courts are not courts of record.

North Carolina inferior courts do not provide for jury trials and transcripts are not available in criminal cases. To require a judge of the superior court to state the new facts upon which his sentence was based would mean, in fact, that a superior court judge could never give a greater sentence after a jury trial DE NOVO than that given by the lower court sitting without a jury. This theory was rejected by six of the Justices of the United States Supreme Court in PEARCE.

If such a theory controlled it would lead to ludicrous results and completely debilitate the machinery of justice in North Carolina. If, as sometimes happens, a defendant was

found guilty of a misdemeanor and given only a warning, but decided he had been wronged in the lower court by a finding of guilt, he could appeal to the superior court as a matter of right. On his jury trial DE NOVO in the superior court, the superior court judge would be forced to conduct a jury trial as to the issue of guilt alone. He would then be absolutely bound by the lower court's warning and could not sentence the defendant when the facts of the case justified the imposition of a sentence. This example is not farfetched and would, in all probability, arise under the petitioner's proposed theory.

In order to avoid such a result, there would be two alternatives open. In the words of Aldrich, C. J.:

> "Either the district courts would tend to give maximum sentences, out of caution, in the interest of the state, which, in turn, would have the effect of encouraging 'appeals,' or, if the district courts tended to give small sentences, the state would be led to avoid the vesting consequences by initiating cases in the superior court in the first instance. The state's two step procedure has a legitimate purpose. We see no occasion for us to expose it to any such dilemma. Rather, we hold the defendant has no constitutional right to complaint of a 'chilling effect' when, in effect, he need not stand in the draft, in the first instance." LEMIEUX v ROBBINS, *supra*, at 356.

If the superior courts were bound by the sentences imposed in the lower courts, it would render ineffective this State's present district court system in regard to criminal trials, as well as other states with similar two-step systems. The purpose of the district court is to decide those cases (most petty misdemeanors) that do not require the more extensive consideration of a superior court jury trial. If the superior court could not impose a greater sentence when such a sentence was demanded by the facts, all defendants would "appeal" to the superior court in order to obtain a second opportunity for a determination of guilt or innocence. This automatic two-step

trial procedure would result in the district court system becoming a mere stepping stone to superior court for criminal defendants, instead of serving the purpose intended by their creation, that of alleviating court congestion by determining cases that did not require jury trial. Under such a system, our criminal district courts would be a cog in the judicial machinery serving no useful purpose.

It is logical to anticipate and it should be presumed, that upon jury trials DE NOVO in the superior court more facts will be brought out than were brought out in the lower court. Jury trials in the superior court tend to result in more witnesses, more extensive cross-examination, and more evidence than do trials in the inferior court. This factor was not present in PEARCE.

The superior court in North Carolina presently tries defendants DE NOVO from the beginning to end on both the law and facts, without regard to the plea, trial, verdict, or judgment in the inferior court. Thus, the judge of the superior court is necessarily required to enter his own independent judgment, since the trial in the superior court is without regard to the proceedings in the inferior court. STATE v. MEADOWS, *supra*; STATE v. OVERBY, 1 NC App 289, 160 SE 2d 461 (1968); DOSS v. NORTH CAROLINA, 252 F Supp 298 (MD, NC 1966).

> "Defendant has the benefit of two full opportunities for acquittal. If he fails to gain acquittal in the district court, his mere exercise of his right to appeal not only gives him a new trial but vacates the judgment and removes the entire case to the superior court. . . . Should he elect to take advantage of a second and free opportunity, it does not seem unfair to us that, absent affirmative proof of vindictiveness, they should start again at parity." LEMIEUX v. ROBBINS, *supra*, at p. 355.

If the trial judges of this State are so devious as the petitioner seems to believe them to be, it would be a simple matter

for them to deny future appellants the very rights which PEARCE purports to protect. In every case in which appeal seemed likely, the lower court could simply sentence the defendant to the maximum sentence allowed for the offense involved. PEARCE would then be clearly inapplicable to the trial DE NOVO in the superior court. It is difficult for the respondent to ascertain how such a practice would enure to the benefit of future defendants.

It should be noted that there was no majority opinion in PEARCE. In that case, Stewart, J., was joined by Warren, C. J., and Brennan, J., leaving the other members of the court in disagreement on the issues. Respondent submits that this Court should not extend the dicta of an uncertain plurality beyond the facts involved in the case decided therein.

> "Looking at the total circumstances, where the state offers the defendant a full trial, with full right of appeal therefrom, in the superior court, we do not think it unreasonable for it to restrict the appeal from the district court in the sense here complained of." LEMIEUX v ROBBINS, supra, at p 356.

In addition, it should be pointed out that petitioner was tried DE NOVO prior to the PEARCE decision. Whether this opinion is to be applied retroactively is yet to be determined.

## CONCLUSION

The respondent respectfully requests that the petition for a Writ of Certiorari be denied.

Respectfully submitted,

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